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No. _____

Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In re HENRY ROBERT GREWE and
KATHY ANNE GREWE,

Debtors.

HENRY ROBERT GREWE and
KATHY ANNE GREWE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether bankruptcy courts are "court[s] of the United States" within the meaning of Section 7430 of the Internal Revenue Code.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were: Henry Robert Grewe, Kathy Anne Grewe, and the United States of America.

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Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Henry Robert Grewe and Kathy Anne Grewe respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a) is reported at 4 F.3d 299. The judgment entered by the United States Bankruptcy Court for the Northern District of West Virginia ("the bankruptcy court") is unreported (App. 16a). The order of the United States District Court for the Northern District of West Virginia accepting and adopting the Findings of Fact and Conclusions of Law entered by

the bankruptcy court is also unreported (App. 17a). The Findings of Fact and Conclusions of Law entered by the bankruptcy court (App. 19a) are reported at 148 B.R. 824.

JURISDICTION

The court of appeals entered its judgment on September 3, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

26 U.S.C. § 7430. Awarding of costs and certain fees.

(a) In general.

In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for --

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) Limitations.

(1) Requirement that administrative remedies be exhausted. A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service.

* * *

(c) Definitions.

For purposes of this section --

(1) Reasonable litigation costs. The term "reasonable litigation costs" includes --

(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished -- . . .

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate.

* * *

(6) Court proceedings. The term "court proceeding" means any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court).

28 U.S.C. § 2412. Costs and fees.

* * *

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings

for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * *

(2) For the purposes of this subsection --

(A) "fees and other expenses" includes . . . reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

* * *

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies (determined without regard to subsections (b) and (f) of such section.) Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

28 U.S.C. § 451. Definitions.

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

28 U.S.C. § 1915. Proceedings in forma pauperis.

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

28 U.S.C. § 2201. Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 1927. Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising

in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

* * *

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

STATEMENT

This case presents the question of whether bankruptcy courts are "court[s] of the United States" within the meaning of Section 7430 of the Internal Revenue Code, 26 U.S.C. § 7430 (1988).

On August 15, 1983, the Internal Revenue Service ("IRS") made assessments against Henry Robert Grewe and Kathy Anne Grewe ("the Grewes") for unpaid federal income taxes for tax years 1977 through 1980. (App. 2a). Subsequently, on November 20, 1989, the Grewes filed a voluntary petition in bankruptcy, under Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of West Virginia ("the bankruptcy court"). (App. 19a). On March 21,

1990, the Grewes received a discharge from the bankruptcy court. (*Id.*). The Grewes and the United States agree that the discharge included the tax liabilities for the years 1977 to 1980. (Joint Appendix filed with the Fourth Circuit, hereinafter referred to as "Record on Appeal" ("ROA"), at 16-17). On May 15, 1990, the bankruptcy case was closed, and the trustee was discharged. (*Id.*).

Despite the discharge of the Grewes' tax liabilities, the IRS continued to pursue them for payment of those liabilities, in violation of 11 U.S.C. § 524(a) (1988), which enjoins attempts by creditors to collect discharged debts. In 1990 and again in 1991, the IRS withheld plaintiff's income tax refunds for tax years 1989 and 1990 on the grounds that it was applying them to payment of their unpaid taxes for tax year 1980. (ROA 10, at ¶ 16; ROA 16). Additionally, on or about February 25, 1992, the district director of the IRS sent the Grewes a Notice of Intention to Levy. (App. 19a). The notice stated that the IRS was seeking $26,666.02 (including penalties and interest) on the basis of unpaid taxes for the tax period ending December 31, 1980. (*Id.*).

On March 25, 1992, the Grewes moved the bankruptcy court to reopen their case, and their motion was granted on April 3, 1992. (App. 20a). On April 7, 1992, the Grewes filed a Complaint to Determine Dischargeability and for Refund of Sums Collected. (ROA 8-15). In that complaint, which was brought against the United States, the Grewes sought a declaration from the bankruptcy court that the tax liabilities at issue had been discharged, payment of the tax refunds that the IRS had wrongfully withheld, and an award for the attorney's fees incurred in enforcing the order of discharge. (ROA 11).

Despite the pendency of these proceedings, on April 13, 1992, the IRS carried out its threat to levy on the Grewes' property by recording a lien on property owned by the Grewes in Wood County, West Virginia. (App. 20a). However, finally recognizing that the Grewes had indeed discharged over two years earlier from the tax liabilities at issue, the United States entered, on May 20, 1992, into an Agreed Order of Dischargeability.

(ROA 16-17). In that order, the bankruptcy court held that the Grewes' federal income tax liabilities for tax years 1977 through 1980 had been discharged in 1990 and that the IRS was to return the income tax refunds that it had wrongfully withheld from the Grewes. (*Id.*). The IRS also agreed to remove the tax lien against the Grewes' property in Wood County, West Virginia. (*Id.*).

On June 11, 1992, the Grewes filed a Motion for Costs and Attorney's Fees in the bankruptcy court. (ROA 18-26). In that motion, the Grewes sought to recover a total of $3,019.04 for attorney's fees and expenses incurred in connection with the reopened bankruptcy proceeding. (ROA 25-26).

With the consent of the parties, the bankruptcy court treated the motion for attorney's fees as a "non-core" proceeding and, rather than deciding the motion itself, made findings of fact and conclusions of law for submission to the United States District Court for the District of West Virginia ("the district court").[1] After reciting the pertinent facts, which are not disputed, the bankruptcy court first decided that the Grewes' request for attorney's fees was governed by 28 U.S.C. § 2412, rather than 26 U.S.C. § 7430.

28 U.S.C. § 2412 (1988 & Supp. IV 1992) is part of the Equal Access to Justice Act ("EAJA") and generally governs the award of costs, attorney's fees, and/or expenses to the "prevailing party

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[1] 28 U.S.C. § 157(c)(1) (1988) provides that:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

in any action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity . . . ." However, 28 U.S.C. § 2412(e) provides that the EAJA "shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 [26 U.S.C. § 7430] applies . . . ." 26 U.S.C. § 7430 governs the award of costs, attorney's fees, and/or expenses to the prevailing party "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title [Title 26] . . . ." 26 U.S.C. § 7430(a). A "court proceeding" is defined as "any civil action brought in *a court of the United States* (including the Tax Court and the United States Claims Court)." 26 U.S.C. § 7430(c)(6) (emphasis added). The Grewes argued, in the bankruptcy court, that 28 U.S.C. § 2412 (which does not require the prevailing party to exhaust its administrative remedies before bringing suit) governed their request for attorney's fees, and that they were entitled to recover under the standards set forth in that statute. (ROA 21-22). The United States argued that 26 U.S.C. § 7430 (which does contain an exhaustion requirement[2]) governed the request for attorney's fees, and that the Grewes were not entitled to recover anything under the standards set forth in § 7430. (ROA 27-32).[3]

Without addressing whether bankruptcy courts are "courts of the United States," the bankruptcy court concluded, on other grounds,

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[2] 26 U.S.C. § 7430(b)(1) provides that "[a] judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service."

[3] The Fourth Circuit ultimately held, in this case, that the Grewes could not recover anything under 26 U.S.C. § 7430 because they had failed to exhaust their administrative remedies. Interestingly, the United States did not rely on the exhaustion requirement in the brief that it filed with the bankruptcy court.

that 26 U.S.C. § 7430 was not applicable.[4] The bankruptcy court further concluded that 28 U.S.C. § 2412 was applicable and that the Grewes were entitled to recover their attorney's fees under the standards set forth in that statute. (App. 21a, 30a-31a). It recommended that the Grewes be awarded $2,035.00 in attorney's fees and expenses. (App. 31a).

The bankruptcy court's Findings of Fact and Conclusions of Law were submitted to the district court, along with the United States' objections to the bankruptcy court's conclusions of law and the Grewes' response to those objections. (App. 17a).[5] After considering the materials submitted, the district court accepted and adopted, in their entirety, the bankruptcy court's Findings of Fact and Conclusions of Law. (App. 17a-18a). Pursuant to the district court's ruling, the bankruptcy court then entered judgment for the Grewes and against the United States in the amount of $2,035.00. (App. 16a).

The United States appealed that judgment to the Fourth Circuit, which reversed and held that the Grewes were not entitled to recover attorney's fees or expenses from the United States.

The Fourth Circuit held that 26 U.S.C. § 7430, rather than 28 U.S.C. § 2412, governed the Grewes' request for attorney's fees. (App. 13a-14a). After rejecting the district court's and the bankruptcy court's rationale for refusing to apply 26 U.S.C.

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[4] 26 U.S.C. § 7430 applies "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest or penalty under this title [Title 26] . . . ." 26 U.S.C. § 7430(a). The bankruptcy court concluded that § 7430 did not apply to the Grewes' motion for attorney's fees because "[n]o proceeding in the case at bar was brought under Title 26. The proceeding in the case at bar is rooted in the I.R.S. violation of [Section 524 of the Bankruptcy Code] . . . not in the determination, collection, or refund of any tax." (App. 21a-22a).

[5] The United States made no objections to the bankruptcy court's findings of fact. (ROA 63).

§ 7430[6], the Fourth Circuit further held that § 7430 was applicable because bankruptcy courts are "courts of the United States" within the meaning of § 7430(c)(6).[7]

The Fourth Circuit acknowledged that the Eleventh Circuit had come to the opposite conclusion in *IRS v. Brickell Inv. Corp. (In re Brickell Inv. Corp.)*, 922 F.2d 696 (11th Cir. 1991). (App. 9a). However, it offered two reasons for disagreeing with the Eleventh Circuit. First, the Fourth Circuit reasoned that under the Bankruptcy Amendments and Federal Judgeship Act of 1984, which was enacted following this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress eliminated the "functional independence" of the bankruptcy courts and made them mere divisions of the district courts; that the "bankruptcy courts are, for jurisdictional purposes, inseparable from the district court . . . ."; and that because the district courts are clearly "courts of the United States," it follows that the bankruptcy courts must also be "courts of the United States." (App. 12a). Second, the Fourth Circuit

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[6] 26 U.S.C. § 7430 applies "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title [Title 26] . . . ." The district court and the bankruptcy court held that because the Grewes' lawsuit against the IRS was based upon a violation of the Bankruptcy Code (the IRS' wrongful attempt to collect on tax debts that had been discharged in bankruptcy), proceedings connected with that lawsuit were not sufficiently tax-related to come within the purview of § 7430. (App. 21a-22a). The Fourth Circuit disagreed and held that because the Grewes' lawsuit against the IRS "stemmed from the IRS's impermissible attempt to collect taxes . . . ," proceedings connected with that lawsuit *were* sufficiently tax-related to come within the purview of § 7430. (App. 9a).

[7] As discussed above, § 7430 applies only to "administrative or court proceedings," § 7430(a), and "court proceedings" are defined in § 7430(c)(6) as "any civil action brought in *a court of the United States* (including the Tax Court and the United States Claims Court)" (emphasis added).

reasoned that because 26 U.S.C. § 7430 requires taxpayers to exhaust their administrative remedies before filing suit (whereas 28 U.S.C. § 2412 does not), holding that § 7430 does not apply to bankruptcy proceedings would permit taxpayers to avoid § 7430's exhaustion requirements by filing suit in bankruptcy court and would therefore create an unjustified "loophole." (App. 13a).

Applying § 7430 to the Grewes' motion for attorney's fees, the Fourth Circuit concluded that they had failed to exhaust their administrative remedies, as required by that statute, and thus were not entitled to recover anything. (App. 13a-14a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS CONSTRUING THE PHRASE "COURT OF THE UNITED STATES"

With regard to whether bankruptcy courts are "courts of the United States" within the meaning of 26 U.S.C. § 7430, the court below expressly recognized that its decision stands in direct conflict with the Eleventh Circuit's decision in *IRS v. Brickell Inv. Corp. (In re Brickell Inv. Corp.)*, 922 F.2d 696 (11th Cir. 1991). *See* App. 9a (noting and disagreeing with the Eleventh Circuit's conclusion that a bankruptcy court is not a "court of the United States" within the meaning of 26 U.S.C. § 7430). *See also United States v. Yochum (In re Yochum)*, 156 B.R. 816, 817-818 (D. Nev. 1993) (agreeing with the Eleventh Circuit). Conversely, several lower federal courts have sided with the Fourth Circuit on this issue. *See Kreidle v. Department of Treasury, IRS (In re Kreidle)*, 145 B.R. 1007, 1016 (Bankr. D. Colo. 1992) (bankruptcy courts are "courts of the United States" within the meaning of 26 U.S.C. § 7430); *In re Chambers*, 140 B.R. 233, 237-238 (N.D. Ill. 1992) (same); *Abernathy v. United States (In re Abernathy)*, 150 B.R. 688, 692-694 (Bankr. N.D. Ill. 1993) (same); *United States, IRS v. Germaine (In re Germaine)*, 152

B.R. 619, 625-627 (9th Cir. BAP 1993) (same).[8] Interestingly, in most of these cases, it was the United States which argued (contrary to its position in this case) that bankruptcy courts are not "court[s] of the United States" and therefore lack jurisdiction to award attorney's fees under 26 U.S.C. § 7430. *See In re Yochum*, 156 B.R. at 817; *In re Kreidle*, 145 B.R. at 1016; *In re Chambers*, 140 B.R. at 237; *In re Germaine*, 152 B.R. at 625.

The decision below also implicitly conflicts with a number of decisions, including decisions of the Third and Ninth Circuits, which have held that bankruptcy courts are not "court[s] of the United States" within the meaning of 28 U.S.C. § 451 (1988). 28 U.S.C. § 451 is the general definitional section for Title 28 and contains a definition of the term "court of the United States" which Congress utilized in drafting 26 U.S.C. § 7430. *See* H.R. Rep. 404, 97th Cong., 1st Sess. 12 n.1 (1981) (the term "court of the United States," as used in § 7430, means "any court described in 28 U.S.C. § 451 or the Tax Court"). In addition to 26 U.S.C. § 7430, 28 U.S.C. § 1915(a) (1988), which concerns the power of a "court of the United States" to allow proceedings *in forma pauperis*, also utilizes § 451's definition of "court of the United States."[9] Lower courts have divided over whether

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[8] In addition, some courts have assumed, without noting or addressing the issue, that bankruptcy courts are "courts of the United States" within the meaning of 26 U.S.C. § 7430. *See, e.g., United States v. McPeck*, 910 F.2d 509, 513-514 (8th Cir. 1990) (remanding case to bankruptcy court so that it could determine, under § 7430, whether debtor was entitled to attorney's fees for IRS' violation of the automatic stay provision, 11 U.S.C. § 362 (1988 & Supp. II 1990)).

[9] At least two other statutes also utilize § 451's definition of "court of the United States": 28 U.S.C. § 2201 (1988), which concerns the power of a "court of the United States" to grant declaratory relief, and 28 U.S.C. § 1927 (1988), which concerns the power of a "court of the United States" to sanction attorneys or others who "multipl[y] the proceedings in any case unreasonably and vexatiously." Construing 28 U.S.C. § 451 in the context of 28 U.S.C. § 2201, the Third Circuit has held that bankruptcy courts are not "court[s] of the United States" within

bankruptcy courts are "court[s] of the United States" within the meaning of 28 U.S.C. § 451 and thus have the powers conferred by 28 U.S.C. § 1915(a).

Construing 28 U.S.C. § 451 in the context of 28 U.S.C. § 1915(a), the Ninth Circuit held in *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 891-894 (9th Cir. 1992), that bankruptcy courts are not "courts of the United States" within the meaning of 28 U.S.C. § 451 and that consequently 28 U.S.C. § 1915(a) does not authorize bankruptcy courts to waive fees. *Accord In re Buck*, 157 B.R. 247, 248-249 (Bankr. W.D. Pa. 1993); *Broady v. Miner (In re Broady)*, 96 B.R. 221, 222-223 (Bankr. W.D. Mo. 1988); *In re Bauckey*, 82 B.R. 13, 14 (Bankr. D. N.J. 1988); *Harewood v. Sarah Allen Home for the Aged, Inc. (In re Sarah Allen Home, Inc.)*, 4 B.R. 724, 726-727 (Bankr. E.D. Pa. 1980).[10] *But see In re Anderson*, 130 B.R. 497, 499 (Bankr. W.D. Mich. 1991) (bankruptcy court is a "court of the United States" within the meaning of 28 U.S.C. § 451 and 28

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the meaning of § 451. *In re Becker's Motor Transp. Inc.*, 632 F.2d 242, 246-247 (3d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). Similarly, construing 28 U.S.C. § 451 in the context of 28 U.S.C. § 1927, a number of lower federal courts have held that bankruptcy courts are not "court[s] of the United States" within the meaning of § 451. *See Regensteiner Printing Co. v. Graphic Color Corp. (In re Regensteiner Printing Co.)*, 142 B.R. 815, 818 (N.D. Ill. 1992) (citing cases). However, it does appear that bankruptcy courts have been given at least some authority, in provisions other than § 2201 and § 1927, to grant declaratory relief and impose sanctions. *See* Bankruptcy Rules 7001(9) and 9011.

[10] The *Sarah Allen* court did, however, waive filing fees for indigent debtors on the grounds that denying them the opportunity to seek lien avoidance on their property would violate their constitutional rights. 4 B.R. at 727.

U.S.C. § 1915(a)); *Shumate v. Signet Bank (In re Shumate)*, 91 B.R. 23, 26 (Bankr. W.D. Va. 1988) (same).[11]

In short, there is a serious split of authority, including a 3-1 split in the circuits, as to whether bankruptcy courts are "courts of the United States" and have the powers granted to such courts. The unsettled state of the law on this question warrants this Court's review.

II. THE DECISION BELOW IGNORES BOTH THE PLAIN LANGUAGE AND THE LEGISLATIVE HISTORY OF 26 U.S.C. § 7430

Both the plain language and the legislative history of 26 U.S.C. § 7430 make it clear that bankruptcy courts are not "court[s] of the United States" within the meaning of that statute.

Section 7430(c)(6) provides that the "court proceedings" to which § 7430 applies are "any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court)." It does not state which courts, other than the Tax Court and the United States Claims Court, are to be considered "court[s] of the United States." However, as noted above, the legislative history of § 7430 indicates that in drafting

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[11] Some cases have also held that when district courts delegate to bankruptcy courts, under 28 U.S.C. § 157, the authority to hear cases under Title 11, the district courts necessarily delegate the powers which they (as "court[s] of the United States") have under 28 U.S.C. § 1915(a). *McGinnis v. McGinnis (In re McGinnis)*, 155 B.R. 294, 296-297 (Bankr. D. N.H. 1993); *Nieves v. Melendez (In re Melendez)*, 153 B.R. 386, 387-390 (Bankr. D. Conn. 1993) (holding that although bankruptcy courts are not "court[s] of the United States" within the meaning of 28 U.S.C. § 451, they may waive fees in matters referred under 28 U.S.C. § 157); *Fisher v. CFC Capital Corp. (In re DuPage Boiler Works, Inc.)*, 97 B.R. 437, 438 (Bankr. N.D. Ill. 1989). However, the Ninth Circuit, among others, disagrees and has held that 28 U.S.C. § 157 does *not* permit bankruptcy courts to exercise the powers that district courts have under 28 U.S.C. § 1915(a). *In re Perroton*, 958 F.2d at 896; *In re Buck*, 157 B.R. at 250.

§ 7430(c)(6), Congress intended to utilize the definition of "court of the United States" in 28 U.S.C. § 451. Thus, in determining whether bankruptcy courts are "court[s] of the United States" within the meaning of 26 U.S.C. § 7430, one must determine whether they are "court[s] of the United States" within the meaning of 28 U.S.C. § 451. Both the plain language and the legislative history of 28 U.S.C. § 451 indicate that bankruptcy courts are *not* "courts of the United States" within the meaning of § 451.

28 U.S.C. § 451 provides, in pertinent part, that:

> As used in this title:
>
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

Accordingly, for bankruptcy courts to be "court[s] of the United States" within the meaning of § 451, they must be regarded as courts "the judges of which are entitled to hold office during good behavior."

However, as the Ninth Circuit pointed out in *In re Perroton*, the "good behavior" language in § 451 "essentially is a term of art." 958 F.2d at 893. The same language is found in Article III of the Constitution, which provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior." U.S. Const. art. III, § 1. The use of the "Article III language in § 451 supports the view that legislators intended a 'court of the United States' to be an Article III court whose judges have life tenure and may only be removed by impeachment." 958 F.2d at 893. But bankruptcy judges are Article I judges and do not have life tenure. *Id.*

Moreover, the legislative history of § 451 indicates that Congress specifically enacted (but then eliminated before its

effective date) an amendment to § 451 which would have added bankruptcy courts to the courts listed in § 451. A provision of the 1978 Bankruptcy Reform Act amended § 451 to read as follows:

> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior, *and bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years.*

Pub. L. No. 95-598 § 213, 92 Stat. 2547, 2661 (1978) (emphasis added). However, this amendment, which was to become effective on June 28, 1984, was eliminated by a subsequent amendment before it took effect. Pub. L. No. 98-353 § 113, 98 Stat. 333, 343 (1984).

Finally, it is significant that although Congress broadened the definition of the term "court of the United States," in § 7430(c)(6), to include not only the Article III courts referred to in 28 U.S.C. § 451, but two non-Article III courts (the Tax Court and the United States Claims Court), it did *not* further broaden that definition to include the bankruptcy courts.

III. WHETHER BANKRUPTCY COURTS ARE "COURTS OF THE UNITED STATES" WITHIN THE MEANING OF 26 U.S.C. § 7430 IS AN IMPORTANT AND RECURRING ISSUE

Whether bankruptcy courts are "courts of the United States" within the meaning of 26 U.S.C. § 7430 (and, consequently, within the meaning of 28 U.S.C. § 451) is an important and recurring question in federal bankruptcy law. It has divided the lower federal courts for years and has produced a 3-1 split among the circuits. *See* discussion *infra* at 12-15.

The answer to this question will not only determine whether bankruptcy courts have jurisdiction to award attorney's fees under

26 U.S.C. § 7430, but also whether bankruptcy courts have the power to allow proceedings *in forma pauperis* under 28 U.S.C. § 1915(a).

In 1991 alone, 943,987 bankruptcy cases were filed in the federal bankruptcy courts, an increase of 21 percent over 1990. *See Report of the Proceedings of the Judicial Conference of the United States* (Mar. 16, 1992), at 5. Those numbers are likely to increase, and a substantial number of those cases are likely to involve at least one of the above issues regarding the powers of bankruptcy courts.

Moreover, the question presented has implications that go well beyond bankruptcy proceedings. As discussed above, in order to determine whether bankruptcy courts are "court[s] of the United States" within the meaning of 28 U.S.C. § 451 requires a determination as to whether the "good behavior" language in § 451 refers only to Article III courts. The latter determination will decide not only whether bankruptcy courts have the powers granted to "court[s] of the United States," but also whether *other* non-Article III courts have those powers.

In short, whether bankruptcy courts are "court[s] of the United States" within the meaning of 26 U.S.C. § 7430 raises a number of important and continuing questions which have divided the lower federal courts and which only this Court can resolve. The fact that the United States has argued both sides of this issue before various lower federal courts (see discussion *infra* at 13) further illustrates the need for the guidance and the uniformity that only this Court can provide.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 2, 1993

APPENDIX

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: HENRY ROBERT GREWE; In Re: CATHY ANNE GREWE, his wife, *Debtors*,	)	No. 93-1223
HENRY ROBERT GREWE; CATHY ANNE GREWE, his wife, *Plaintiffs-Appellees*,	)	
v.	)	
UNITED STATES OF AMERICA, on behalf of its agency, Internal Revenue Service, *Defendant-Appellant*.	)	

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins,
Robert E. Maxwell, Chief District Judge.
(MISC-92-117-E, BK-89-00930)

Argued: July 12, 1993

Decided: September 3, 1993

Before HAMILTON, LUTTIG, and WILLIAMS, Circuit Judges.

Reversed by published opinion. Judge Hamilton wrote the opinion, in which Judge Luttig and Judge Williams joined.

COUNSEL

ARGUED: Joy Lea Pritts, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Martin Patrick Sheehan, VOLK, FRANKOVITCH, ANETAKIS, RECHT, ROBERTSON & HELLERSTEDT, Wheeling, West Virginia, for Appellees. ON BRIEF: Michael L. Paup, Acting Assistant Attorney General, Gary R. Allen, Kenneth L. Greene, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. John H. Kamlowsky, VOLK, FRANKOVITCH, ANETAKIS, RECHT, ROBERTSON & HELLERSTSEDT, Wheeling, West Virginia, for Appellees.

OPINION

HAMILTON, Circuit Judge:

The issue presented in this appeal focuses on which statute governs the attorneys' fee request of the appellees, Henry and Cathy Grewe (the Grewes). The district court, in adopting the recommendation of the bankruptcy court, ruled that the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b), controlled. On appeal, the Internal Revenue Service (IRS) claims that the Internal Revenue Code (the IRC), 26 U.S.C. § 7430, rather than the EAJA, should apply. For the reasons that follow, we agree with the IRS. In addition, because the Grewes failed to satisfy the requirements of the IRC, we also hold the district court erred when it awarded attorneys' fees to the Grewes and, therefore, reverse the award of attorneys' fees.

I

In 1983, the IRS made assessments against the Grewes for unpaid federal income taxes with respect to their 1977-80 tax years. In 1986, the IRS filed a notice of federal income tax liens for these past due taxes. On November 20, 1989, because of their financial difficulties, the Grewes filed a voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Code. On March 21, 1990, the Grewes received a discharge of their debts pursuant to 11 U.S.C. § 523, which discharged their past due federal tax liabilities. Shortly thereafter, their bankruptcy case was closed.

Apparently ignorant of the discharge, the district director of the IRS sent the Grewes a Notice of Intention to Levy on February 25, 1992 in an effort to collect some of these past due taxes. This Notice indicated that the IRS intended to levy on the Grewes' personal property as a result of their unpaid federal income tax for the 1980 tax year. The IRS sought to recover an amount totalling $26,666.

Because the Grewes' prior bankruptcy proceeding had discharged their obligation for these taxes, the Grewes filed a motion on March 25, 1992 with the bankruptcy court, requesting that their bankruptcy case be reopened. After the bankruptcy court granted this motion, the Grewes filed a complaint against the IRS on April 7, 1992, without first pursuing any administrative remedies within the IRS itself. In their complaint, the Grewes alleged that the IRS's collection efforts violated the permanent discharge injunction of 11 U.S.C. § 524(a). On April 13, 1992, the IRS recorded a lien on the Grewes' property in Wood County, West Virginia. After discovering that these debts had been discharged in bankruptcy, however, the IRS promptly prepared a judgment in which it conceded that the Grewes were no longer liable for these taxes. The IRS also agreed to remove the tax lien against the Grewes' property.

After the bankruptcy court adopted this judgment, the Grewes filed a motion requesting costs and attorneys' fees against the IRS for the IRS's violation of the Bankruptcy Code's discharge provisions. The parties then agreed to submit the matter to the bankruptcy court pursuant to 28 U.S.C. § 157(c)(1), under which the bankruptcy court would make proposed findings of fact and conclusions of law and submit them to the district court for a *de novo* review and entry of a final order. (Joint Appendix (J.A.) 50).[1] In the proceedings before the bankruptcy court, the parties

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[1] That statute provides, in relevant part:

> A bankruptcy court may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings

disputed which statute should determine whether the Grewes could recover attorneys' fees from the IRS. The IRS argued that 26 U.S.C. § 7430 of the Internal Revenue Code (IRC) governed. Under that statute, the IRS claimed the Grewes could not recover any attorneys' fees because they failed to exhaust their administrative remedies within the IRS before filing their adversary proceeding in the bankruptcy court. In response, the Grewes claimed that the EAJA, 28 U.S.C. § 2412(b), rather than the IRC, dictated whether the Grewes could recover attorneys' fees in the present case.

In the bankruptcy court's proposed findings of fact and conclusions of law (J.A. 49-62), it found that the EAJA, rather than the IRC, dictated whether the Grewes could recover attorneys' fees. The bankruptcy court then recommended that, pursuant to the EAJA, the Grewes should be awarded attorneys' fees totalling $2,035. (J.A. 61). After the IRS filed objections, the bankruptcy court submitted its proposed findings of fact and conclusions of law, along with the IRS's objections, to the United States District Court for the Northern District of West Virginia. Upon a *de novo* review, the district court entered an order accepting and adopting in whole the bankruptcy court's proposed findings of fact and conclusions of law. (J.A. 84). Pursuant to the district court's order, the bankruptcy court then entered judgment against the IRS in the amount of $ 2,035. (J.A. 86).

The IRS now appeals.

II

On appeal, the IRS claims that the district court erred when it ruled that the EAJA, rather than the IRC, applied to the Grewes' request for attorneys' fees. In support, the IRS relies on 28

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of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and after reviewing *de novo* those matters to which any party has timely and specifically objected.

28 U.S.C. § 157(c)(1) (1993 Supp.).

U.S.C. § 2412(e) of the EAJA, which expressly provides that "the provisions of this section shall not apply to any [request for] fees . . . in connection with any proceeding to which section 7430 of the Internal Revenue Code . . . applies." Because the Grewes' request for fees stems from a tax matter, the IRS argues that the IRC, rather than the EAJA, determines whether the Grewes may recover attorneys' fees. We find this argument persuasive.

The EAJA, 28 U.S.C. § 2412(b), provides one avenue through which prevailing parties may recover attorneys' fees against the United States or its agencies. Specifically, that statute provides, in relevant part:

> [A] court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought . . . against the United States or any agency of the United States . . . in any court having jurisdiction of such action . . . .

Id. However, the EAJA does not apply to all actions for attorneys' fees against the United States. Section 2412(e) of the EAJA specifically limits the applicability of the EAJA by providing:

> The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code applies . . . .

28 U.S.C. § 2412(e). Because the EAJA expressly yields to "any proceeding to which section 7430 of the [IRC] applies," determining which statute applies to a particular request for attorneys' fees necessarily focuses first on the IRC. *Id.* Only if the IRC does not apply may a party rely on the EAJA. The jurisdictional statute within the IRC, 26 US.C. § 7430(a), indicates that the IRC applies:

> In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection or refund of any tax, interest or penalty under this title . . . .

Id. It follows, if the requirements for this statute are met, a court must apply this statute rather than the EAJA in determining whether a request for attorneys' fees against the United States may be granted. *Smith v. Brady*, 972 F.2d 1095, 1099 (9th Cir. 1992) (citing *United States v. McPherson*, 840 F.2d 244, 245-46 (4th Cir. 1988)).

In the present case, the specific requirements of § 7430(a) at issue are: (a) whether the proceedings qualify as an "administrative or court proceeding"; (b) whether the proceedings were brought "in connection with the . . . collection . . . of any tax"; and (c) the meaning of "under this title." We conclude that the Grewes' request for attorneys' fees satisfies all three of these requirements and, therefore, IRC § 7430 applies. We discuss our rationale with respect to each requirement separately and in inverse order.

A

In finding that the EAJA applied to the present case, the district court partially relied on the fact that "no proceeding in the case at bar was brought under Title 26." (J.A. 52,85). Thus, the district court interpreted "under this title" in § 7430(a) to modify "any administrative or court proceeding," such that the proceeding had to be brought under Title 26 before § 7430 applied. We reject this interpretation because it conflicts with general rules of statutory construction and established precedent.

General statutory interpretation rules require "a limiting clause . . . to be applied only to the last antecedent." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). *See also, Huffman v. Commissioner*, 978 F.2d 1139, 1145 (9th Cir. 1992); *United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972). Accordingly, "under this title" modifies "any tax, interest or penalty," rather than "any administrative or court proceeding." Thus, the proper interpretation of § 7430(a) is that the IRC applies to any proceeding brought in connection with the collection of any tax, interest or penalty *imposed* by Title 26.

The Eight Circuit's opinion in *United States v. McPeck*, 910 F.2d 509 (8th Cir. 1990), confirms our interpretation. In that case, the IRS made several efforts to collect past due taxes after the taxpayer filed for bankruptcy protection. The taxpayer then filed a motion "under 11 U.S.C. § 362(h) alleging that the IRS had willfully violated the automatic stay." *Id.* at 511. The district court agreed and awarded the taxpayer $2,825 in attorneys fees. On appeal, the IRS claimed § 7430(a), rather than the EAJA, § 2412(b), dictated whether the taxpayer could recover attorneys' fees. The Eighth Circuit agreed, reasoning: the "I.R.C. § 7430 is applicable here because that section applies to any 'administrative or court proceeding which is brought by or against the United States in connection with the determination, *collection*, or refund of any tax . . . .'" *Id.*, quoting 26 U.S.C. § 7430 (a).

Thus, the fact that the taxpayer brought her request for attorneys' fees under Title 11, rather than Title 26, did not preclude the *McPeck* court from applying 26 U.S.C. § 7430(a). We adopt the reasoning in *McPeck* and hold that 26 U.S.C. § 7430(a) is not limited *solely* to requests for attorneys' fees in proceedings which are *brought under* Title 26, but rather to *any* "administrative or court proceeding" brought in connection with "the determination, collection or refund of any tax" *imposed* by Title 26. 26 U.S.C. § 7430(a).

B

The IRS and the Grewes also dispute whether the proceedings in the present case were brought "in connection with the determination, collection or refund of any tax . . . ." 26 U.S.C. § 7430(a). The district court found that the proceedings did not satisfy this requirement, reasoning "the proceeding . . . at bar [was] rooted in the [IRS's] violation of a § 524 discharge, not in the determination, collection, or refund of any tax." (J.A. 52, 85). We find the district court's rationale unpersuasive.

We begin our discussion by once again focusing on *McPeck*. In that case, the court applied § 7430 to the taxpayers' request for attorneys' fees even though the underlying lawsuit stemmed from

the IRS's violation of the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362. Thus, as in the present case, McPeck's action was "rooted in the [IRS's] violation of" the Bankruptcy Code (J.A. 52), but the court nevertheless found that McPeck's action was brought "in connection with the . . . *collection* . . . of any tax . . . under the Internal Revenue Code." *McPeck*, 910 F.2d at 513 (quoting 26 U.S.C. § 7430(a)).

In addition, in *Brady*, 972 F.2d at 1099, the Ninth Circuit applied § 7430 to the taxpayers' request for attorneys' fees despite the taxpayers' contention that their claim was "brought solely to redress violations of their constitutional rights [and] simply ha[d] nothing to do with [their] taxes." *Id.* In that case, after the IRS mistakenly disallowed deductions for the taxpayers' donations to the Church of Scientology, the taxpayers filed suit claiming that the IRS violated their constitutional guarantee to freedom of religion. After recognizing its mistake, the IRS settled its dispute with the taxpayers. The taxpayers then filed a motion requesting attorneys' fees under the EAJA, which the district court granted.

On appeal, the IRS argued that the IRC, rather than the EAJA, dictated whether the taxpayers could recover attorneys' fees. In response, the taxpayers argued that their underlying action was "brought solely to redress violations of their constitutional rights [and] simply has nothing to do with the [their] taxes." *Id.* The Ninth Circuit accepted the IRS's argument, reasoning: "although there were collateral purposes to the [taxpayers'] suit, it was clearly connected to IRS actions in determining the Smiths' taxes." *Id.*[2]

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[2] *See also, In re Abernathy*, 150 B.R. 688, 694 (Bankr. N.D. Ill. 1993), where the court opined:

> This proceeding is clearly "brought. . . in connection with the determination, collection or refund of any tax, interest or penalty . . . ." 26 U.S.C. § 7430(a). The central theme of the instant proceeding is the IRS's attempts to collect taxes that were discharged in bankruptcy. This proceeding would not have arisen but for the IRS' [sic] attempt to collect discharged income taxes.

Under this precedent, any lawsuit "clearly connected to IRS actions in determining [or collecting] taxes," falls within the purview of § 7430(a). *Brady*, 972 F.2d at 1099. In the present case, the proceedings for which the Grewes requested attorneys' fees unquestionably satisfies this test. Specifically, the underlying lawsuit which spawned the Grewes' request for attorneys' fees stemmed from the IRS's impermissible attempt to collect taxes which had previously been discharged. Thus, we think the proceedings in the present case were clearly "brought. . . in connection with the . . . collection . . . of any tax," as described in 26 U.S.C. § 7430(a).

C

Finally, the Grewes contend that the IRC does not apply in the present case because the proceedings giving rise to their attorneys' fee request are not "administrative or court proceeding[s]" under 26 U.S.C. § 7430(a). In support, the Grewes point to two authorities: (1) 26 U.S.C. § 7430(c)(6), which defines a "court proceeding" as "any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court)," and (2) *In re Brickell Investment Corp.*, 922 F.2d 696, 701 (11th Cir. 1991), where the Eleventh Circuit held that the phrase "court of the United States" in § 7430(c)(6) only includes Article III courts, and thus excludes bankruptcy courts. Because the Grewes initially filed the proceedings to resolve their tax dispute in a bankruptcy court, which is not a "court of the United States" under the IRC, the Grewes conclude that the proceedings in the present case do not qualify as an "administrative or court proceeding" under § 7430(a) and, therefore, the EAJA controls. We disagree.

We begin our discussion by noting that the authorities are divided as to whether a bankruptcy court qualifies as a "court of the United States" under the IRC and, therefore, has jurisdiction to award attorneys' fees under § 7430. Although the Eleventh Circuit held in *In re Brickell*, 922 F.2d at 701, that a bankruptcy court is not a "court of the United States" and does not ordinarily have jurisdiction to award attorneys' fees under the IRC, several

other authorities either implicitly or explicitly reject this holding. *See, e.g., McPeck*, 910 F.2d 509; *In re Chambers*, 140 B.R. 233, 237 (N.D. Ill. 1992); *In re Germaine*, 152 B.R. 619, 627 (9th Cir. BAP 1993); *In re Abernathy*, 150 B.R. at 693; *In re Kreidle*, 145 B.R. 1007, 1016 (Bankr. D. Col. 1992).[3] For reasons that follow, we agree with those courts holding that bankruptcy courts qualify as "court[s] of the United States."

In holding that bankruptcy courts do not qualify as "court[s] of the United States" under 26 U.S.C. § 7430, the *Brickell* court relied on the fact that several courts interpreted this phrase to include only Article III courts under Title 28. *See, e.g., In re Davis*, 899 F.2d 1136 (11th Cir. 1990); *Matter of Becker's Motor Transp., Inc.*, 632 F.2d 242 (3d Cir. 1980). Because § 7430(c)(6) expressly included only two non-Article III courts--the Tax Court and Claims Court--the *Brickell* court reasoned that Congress must have intended to exclude all other non-Article III courts when it enacted § 7430(c)(6). Specifically, the *Brickell* court opined "[t]he fact that § 7430 expressly extended jurisdiction to the Tax Court and the Claims Court lends further support to our holding that these non-Article III courts would not have otherwise been given jurisdiction under the rubric of 'court of the United States'" *Brickell*, 922 F.2d at 701. We disagree with this rationale.

Congress originally authorized the creation of bankruptcy courts in the Bankruptcy Reform Act of 1978. Under this Act, Congress assigned bankruptcy courts jurisdiction over "all cases under title 11 [or] related to cases under title 11." 28 U.S.C. §§ 1471(a)(c)(repealed). Although Congress classified bankruptcy courts as "adjuncts" of the district court, 28 U.S.C. § 151(a) (repealed), Congress intended the bankruptcy courts to be "functionally independent" from the district court. S. Rep. No.

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[3] The most recent decision on this issue adopted the reasoning of *Brickell*. *In re Yochum*, ____ BR ____, ____, No. CV-N-93-131-ECR, 1993 WL 284821 at *2 (D. Nev. July 3, 1993).

989, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5801. Also, by refusing to grant life tenure to its judges, Congress deprived bankruptcy courts of Article III status.

In 1982, the Supreme Court found this broad grant of jurisdiction to non-Article III courts violated the separation of powers underpinning of the Constitution. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). A plurality of the Court opined "[T]he Bankruptcy Act of 1978 has impermissibly removed most, if not all, of the essential attributes of the judicial power from the Art. III district court, and has vested those powers in a non-Art. III adjunct." *Id.* at 87 (internal quotation omitted). In response, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.). Congress intended this Act to remedy the problems depicted in *Marathon* by eliminating the "functional independence" of the bankruptcy court, and instead making it a mere division of the district court. 1 Collier on Bankruptcy § 3.01[2][a] (15th ed. 1993). *See also*, *In re Northwest Cinema Corp.*, 49 B.R. 479, 480 (Bankr. D. Minn. 1985).

Under this new structure, federal district courts exercise original jurisdiction over all "matters and proceedings in bankruptcy," 28 U.S.C. § 1334, and bankruptcy judges "serve as judicial officers of the United States district court established under Article III of the Constitution." 28 U.S.C. § 152(b). Bankruptcy courts are mere "unit[s] of the district court," 28 U.S.C. § 151, and derive their jurisdiction only through 28 U.S.C. § 157(a)(1), which authorizes district courts to refer bankruptcy matters at their discretion to bankruptcy courts.[4] However, district courts retain the power to withdraw any

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[4] In the Northern District of West Virginia, an order entered on August 24, 1984 by District Judges Maxwell and Kidd automatically refers all bankruptcy matters to the bankruptcy court for that district.

reference from the bankruptcy court. 28 U.S.C. § 157(d). Thus, "while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, *i.e.*, the district court." *In re Northwest Cinema Corp.*, 49 B.R. at 480.

Because district courts clearly constitute "court[s] of the United States" and bankruptcy courts are not separate from, but rather units or divisions of the district court, we think Congress also intended bankruptcy courts to qualify as "court[s] of the United States" under § 7430(c)(6). The fact that Congress added the parenthetical "including the Tax Court and the Claims Court," without specifically including bankruptcy courts in this statute does not alter our conclusion. Rather, because bankruptcy courts are, for jurisdictional purposes, inseparable from the district court, we believe Congress did not think it necessary to specifically include them in this statute. However, since the Tax Court and Claims Court are non-Article III courts *and* "independent judicial bodies, [they] had to be specifically included in § 7430" to qualify as "court[s] of the United States." *In re Chambers*, 140 B.R. at 237. Thus, we hold that bankruptcy courts qualify as "courts of the United States" under § 7430(c)(6).[5]

To hold otherwise would create an anomalous result. Specifically, when Congress enacted § 7430, it provided a mechanism through which taxpayers could resolve their tax disputes with the IRS. As part of this mechanism, Congress imposed a requirement that parties exhaust administrative remedies within the IRS before seeking judicial relief. 26 U.S.C. § 7430(b)(1). The Senate Committee on Finance explained the purpose for this requirement:

> This provision of the amendment is intended to preserve the role that the administrative appeals process plays in the

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[5] This interpretation also complies with the general rule of statutory construction that the parenthetical beginning with "including" enlarges the scope of § 7430(c)(6) rather than limits it. *America Surety Co. v. Marotta*, 287 U.S. 513, 517 (1933).

> resolution of tax disputes by requiring taxpayers to pursue such remedies prior to litigation . . . . This rule will prevent taxpayers from recovering litigation costs when the litigation might have been avoided or reduced in scope through the use of administrative remedies.

Technical Explanation of Committee Amendment, 127 Cong. Rec. S.15594 (daily ed. Dec. 16, 1981). *See also, Kenlin Industries, Inc. v. United States*, 927 F.2d 782, 786 (4th Cir. 1991). Our court recognizes the importance of such exhaustion requirements:

> Exhaustion [of administrative remedies] allows the administrative agency to act within the sphere of its special competence, to apply its expertise, and to correct its own errors, and it creates a reasonable division of labor between agency and court.

Mullins Coal Co. v. Clark, 759 F.2d 1142, 1145 (4th Cir. 1985).

However, if bankruptcy courts do not qualify as "court[s] of the United States," then the requirements of § 7430 would not apply when parties seek to resolve their tax disputes with the IRS by filing suit in a bankruptcy court. Under this scenario, parties could avoid the exhaustion requirement imposed by § 7430(b)(1) and still recover attorneys' fees under the EAJA. We doubt Congress desired to create such a loophole or incongruous result. Rather, we believe Congress intended parties to exhaust their administrative remedies within the IRS before seeking *any* judicial relief. Thus, we conclude that Congress intended to include bankruptcy courts within the rubric of "court[s] of the United States" as depicted in § 7430(c)(6).

Because bankruptcy courts qualify as "court[s] of the United States" under § 7430(c)(6), the proceedings in the present case clearly constitute an "administrative or court proceeding" as described within § 7430(a). In addition, since all of the relevant requirements of § 7430(a) are satisfied, we conclude that § 7430 applies to the Grewes' request for attorneys' fees. Finally,

because "in the cases to which § 7430 applies it is exclusive and precludes recovery under the EAJA," *Brady*, 972 F.2d at 1099, the district court erred in finding that the EAJA, rather than the IRC, governed the Grewes' request for attorneys' fees.

III

We next turn to the question of whether the Grewes may recover attorneys' fees under the IRC. Under 26 U.S.C. § 7430 of the IRC, the Grewes must satisfy three elements before recovering attorneys' fees: (1) they must exhaust their administrative remedies; (2) they must be a "prevailing party"; and (3) their claim must be reasonable. *Kenlin*, 927 F.2d at 786. Because the Grewes failed to satisfy the first element, i.e., exhaustion of administrative remedies, we conclude that the Grewes are not entitled to recover attorneys' fees under § 7430.

Section § 7430(b)(1) provides that litigation costs shall not be awarded "unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the [IRS]." Exhausting administrative challenges to the IRS's filing of a federal tax lien requires the taxpayer to "submit[] to the district director of the district having jurisdiction over the dispute a written claim for relief reciting facts and circumstances sufficient to show the nature of the relief requested and that the [taxpayer] is entitled to such relief" and allowing the district director a reasonable time to respond in writing. 26 CFR § 301.7430(d) (1992). Because the Grewes failed to pursue this administrative remedy, but instead challenged the IRS' actions by immediately filing suit in the bankruptcy court, they cannot recover attorneys' fees under § 7430. *Kenlin*, 927 F.2d at 789 (the "failure [to exhaust administrative remedies] is conclusive against an award of attorney's fees . . . .").[6]

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[6] The Grewes also claim that there was no administrative remedy available "to make the IRS give back money taken in violation of 11 U.S.C. § 524, to stop a levy in violation of that same law, or to have removed a lien *after* suit was initiated in violation of law." (Brief of Appellees 15). However, 26 CFR § 301.7430(d) provides administrative

IV

For the reasons stated herein, we reverse the award of attorneys' fees.

REVERSED

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remedies for IRS "actions involving summonses, *levies*, *liens* . . . and termination assessments, *etc.*" (emphasis added). Thus, this regulation provided the Grewes with an adequate administrative remedy.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:	§	
HENRY ROBERT GREWE	§	
and CATHY ANNE GREWE,	§	
Debtors.	§	BK NO. 89-00930
	§	
HENRY ROBERT GREWE and	§	
CATHY ANN GREWE,	§	
Plaintiffs,	§	
v.	§	AP NO. 92-5029
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

JUDGMENT

Consistent with the Order entered December 30, 1992, by the Honorable Robert E. Maxwell, United States District Judge for the Northern District of West Virginia, in Miscellaneous No. 92-117-E which Order approved and adopted in whole this Court's Findings of Fact and Conclusions of Law, it is hereby

ORDERED and ADJUDGED that judgment is entered in favor of the Plaintiffs/Debtors, Henry Robert Grewe and Cathy Ann Grewe, and against the Defendant, the United States of America, in the amount of Two Thousand Thirty-Five Dollars ($2,035.00).

DATED: January 5, 1993

/s/ Michael D. Sturm
MICHAEL D. STURM, Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ELKINS MISCELLANEOUS NO. 92-117-E

IN RE:	§	
HENRY ROBERT GREWE	§	BK NO. 89-00930
and CATHY ANNE GREWE,	§	
Debtors.	§	
	§	
HENRY ROBERT GREWE and	§	
CATHY ANN GREWE,	§	
Plaintiffs,	§	
v.	§	AP NO. 92-5029
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

ORDER

On December 23, 1992 this Court, in the above-styled civil action, received from United States Bankruptcy Judge L. Edward Friend, Findings of Fact and Conclusions of Law, sent pursuant to 28 U.S.C. § 157(c). Included with that document are: 1) Counsel's Motion for Costs and Attorney Fees, 2) the Government's Opposition to the Motion for Costs and Attorney Fees, 4) the Government's Objections to the Findings of Fact and Conclusions of Law, 3) Plaintiffs' counsel's Response to the Government's objections, and 4) a docket sheet from this proceeding. Upon review of the proposed findings of fact and conclusions of law, and the timely submission of specific objections, the issues presented are ripe for disposition.

Upon an examination of the objections filed by Defendant, it appears to the Court that Defendant has not raised any issues that were not thoroughly considered by Judge Friend in his Findings of Fact and Conclusions of Law. Moreover, the Court, upon an independent, *de novo* review of all matters now before it, is of the

opinion that the Findings of Fact and Conclusions of Law accurately reflect the law applicable to the facts and circumstances before the Court in the present action. Therefore, it is

ORDERED that Judge Friend's Findings of Fact and Conclusions of Law be, and hereby is, ACCEPTED and ADOPTED in whole.

ENTER: December 30th, 1992.

/s/ Robert E. Maxwell
UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed instrument
is a true and correct copy of the original filed
in my office.
ATTEST: Dr. Wally Edgell
Clerk, U.S. District Court
Northern District of West Virginia

/s/ (illegible)
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:	§	
HENRY ROBERT GREWE	§	BK NO. 89-00930
and CATHY ANNE GREWE,	§	
Debtors.	§	
	§	
HENRY ROBERT GREWE and	§	
CATHY ANN GREWE,	§	
Plaintiffs,	§	
v.	§	AP NO. 92-5029
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There are two issues which must be decided. The first is whether the issue of whether to award the debtors attorneys' fees must be decided under the Equal Access to Justice Act (28 U.S.C. § 2412) or the Internal Revenue Code (26 U.S.C. § 7430). The second is whether the Internal Revenue Service shall be held liable for an award of attorneys' fees to the debtors, Henry Robert Grewe and Cathy Ann Grewe, his wife.

FACTS

The parties have stipulated the following facts: The debtors filed their voluntary Chapter 7 petition with this Court on November 20, 1989, and received a discharge of their debts on March 21, 1990. The case was closed on May 15, 1990. On or about February 25, 1992, the District Director of the Internal Revenue Service (hereinafter "I.R.S."), sent the debtors a Notice of Intention to Levy. The notice set forth that the I.R.S. intended to levy as a result of unpaid taxes for the tax period ending December 31, 1980. The I.R.S. was seeking the tax balance, including accumulated interest and penalty totaling $26,666.02.

The Grewes' bankruptcy discharge included the subject taxes, *including accumulated interest and penalty. On March 25, 1992,* the debtors moved the Bankruptcy Court to reopen their bankruptcy case, which motion was granted on April 3, 1992. On April 7, 1992, the Grewes filed this adversary proceeding and, on April 8, 1992, served the I.R.S. On April 13, 1992, the I.R.S. recorded a lien in Wood County, West Virginia. In lieu of filing an answer to the hereinbefore mentioned adversary proceeding, on May 20, 1992, the I.R.S. prepared a judgment in this matter conceding the correctness of the debtors' position. The I.R.S. has further agreed to remove the lien which it filed in 1992.

The debtors' motion for costs and attorneys' fees specifically requests an award of attorneys' fees in the amount of $2,964 and an expense reimbursement for $295. Because $240 has been prepaid, the debtors request a total award of $3,019.

CONCLUSIONS OF LAW

Without this Court having to determine whether the matter at bar is a core proceeding (28 U.S.C. § 157(b)), the parties have agreed to allow this Court to make findings of fact and conclusions of law and to submit them to the District Court under 28 U.S.C. § 157(c)(1). Regardless of any conclusion which may have been set forth in the core proceeding issue, this Court must determine under which of two potentially applicable statutes the issue of whether or not to award debtors attorneys' fees must be decided.[1] The two potentially applicable statutes are 28 U.S.C. § 2412 or 26 U.S.C. § 7430. This Court concludes that, of the

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[1] That is to say, if this Court had addressed the core proceeding issue and had determined that, in fact, the matter at bar was a core proceeding, then this Court shall have had to determine the merits of the case. If this Court was required to determine the merits of the case, then it would have had to decide the same issues as those to which this Court herein makes findings of fact and conclusions of law.

two statutes under consideration, the attorneys' fee issue should be decided within the penumbra of 28 U.S.C. § 2412.[2]

Section 7430 of the Internal Revenue Code applies to administrative or court proceedings brought in connection with the determination, collection, or refund of any tax, interest, or penalty under Title 26.[3] No proceeding in the case at bar was

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[2] Title 28 § 2412 read as follows:

(b) unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States . . . in any court having jurisdiction of such action . . . .

(d)(1)(A) . . . a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . ., including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified . . . .

(2) for the purposes of this subsection --

(A) "fees and other expenses" includes . . . reasonable attorney fees . . .[A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee . . . .

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based. . . .

[3] Internal Revenue Code § 7430 reads as follows:

(a) In general -- In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or settlement for . . .

(2) reasonable litigation costs incurred in connection with such court proceeding . . . .

(c) Definitions - For purposes of this section --

brought under Title 26. The proceeding in the case at bar is rooted in the I.R.S. violation of a § 524 discharge, not in the determination, collection, or refund of any tax. To find that the proceeding is one in connection with the determination, collection, or refund of any tax on the basis that the I.R.S. filed a notice of intention to levy regarding previously discharged taxes, would be to elevate form over substance. In substance, these proceedings were brought clearly within the purview of a Bankruptcy Code violation and not, as the I.R.S. filing connotes in form, in connection with the determination, collection, or refund of any tax.[4]

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(1) Reasonable litigation costs. -- The term "reasonable litigation costs" includes -- . . .

(B) based upon prevailing market rates for the kind or quality of services furnished -- . . .

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate.

(4) Prevailing party --

(A) In general -- The term "prevailing party" means any party in any proceeding to which subsection (a) applies . . .

(i) which establishes that the position of the United States in the proceeding was not substantially justified . . .

(7) Position of United States -- The term "position of the United States" means --

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies . . .

[4] There is much case law which demonstrates the kind of actions which clearly fall under Internal Revenue Code § 7430. *See generally Bowles v. United States of America*, 947 F.2d 91 (4th Cir. 1991). Pursuant to Internal Revenue Code § 162, the taxpayers in *Bowles* took business deductions for traveling expenses. Following the I.R.S. disallowance of these deductions, the taxpayers paid additional taxes owed and then claimed a refund. The I.R.S. denied their refund claims on the ground

Moreover, as stated by the court in *In re Conti*, 42 B.R. 122, at 128 n.3 (Bankr. E.D. Va. 1984), "[a]n examination of . . . code section [7430] reveals that it is intended to protect the IRS with regard to unauthorized disclosures of tax returns and return information. Nothing in the statute suggests that it would apply to violations of § 362 of Title 11 . . . or that it was enacted to modify a litigant's rights pursuant to 28 U.S.C. § 2412(b)." Following that analysis, nothing in Internal Revenue Code § 7430 suggests that it would apply to violations of Bankruptcy Code § 524. All proceedings in the case at bar were brought within the purview of Title 11, the Bankruptcy Code.

Also, legislative history can often be a source of great assistance in interpreting various statutes or in determining the

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that the deductions were personal expenses. The taxpayers instituted an action in federal district court. Shortly before trial, the I.R.S. changed its position. Adopting the new position of the I.R.S., the district court dismissed the taxpayers' complaint. *Sua sponte*, the district court later reinstated the action, but again dismissed the taxpayers. Upon the taxpayers' first appeal, the court held that the last minute change of position by the I.R.S. surprised the taxpayers at trial and that the district court erred in dismissing the suit. On remand, a federal magistrate judge ruled in favor of the I.R.S. While the taxpayers' objection to the magistrate judge's report and recommendation was pending before the district court, the I.R.S. notified the court that it would allow the deductions, but would oppose other expenses. The magistrate judge entered a report and recommendation in favor of the taxpayers on the conceded deductions, but found in favor of the I.R.S. on the contested expenses. The taxpayers then filed a motion for an award of costs and attorneys' fees. Ultimately, the United States Court of Appeals for the Fourth Circuit decided the issue under Internal Revenue Code § 7430. *Id.* This Court notes that, in both form and substance, the matters which the court in *Bowles* decided, fell squarely within the parameters of Internal Revenue Code § 7430. *See also Kaufman v. Roscoe*, 758 F.2d 1 (1st Cir. 1985); *Smith v. Brady*, 972 F.2d 1095 (9th Cir. 1992); *Sher v. Commissioner of Internal Revenue*, 861 F.2d 131 (5th Cir. 1988). *Contra United States of America v. McPeck*, 910 F.2d 509 (8th Cir. 1990).

purpose or purposes for which they were created. When called upon to interpret a statute, a court must first examine the statutory language itself. *O'Conner v. U.S. Department of Energy*, 942 F.2d 771 (10th Cir. 1991) (citing *United States v. Turkette*, 452 U.S. 576 (1981)). When the language of the statute is clear and unambiguous, judicial inquiry is complete and that language controls absent rare and exceptional circumstances. *See O'Conner* at 773 (citing *Rubin v. United States*, 449 U.S. 424 (1981)). A court should venture into the thicket of legislative history only when necessary to determine a statutory purpose obscured by ambiguity. *See O'Conner* at 773 (citing *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454 (1987)). The language of Title 28, § 2412 is clear and unambiguous. Thus, as to the interpretation of the statute, this Court's inquiry is complete. However, this Court will venture briefly into the statute's legislative history. One may glean from the legislative history of the EAJA that the overall purpose of the statute is to place the private litigant and the United States on equal footing as regards the award of costs to the prevailing party in litigation involving the government. *O'Conner v. U.S. Department of Energy*, 942 F.2d 771 (10th Cir. 1991) (citing S. Rep. No. 1329, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2527, 2528). Based upon the persuasiveness of the courts' analyses in *Conti* and *O'Conner*, rather than applying § 7430 of the Internal Revenue Code, this Court finds that Title 28, § 2412 of the United States Code applies here.

Even if 26 U.S.C. § 7430 applied here, the I.R.S. would have this court find that an award of attorneys' fees is not warranted. In making its determination, the I.R.S. looks to 26 U.S.C. § 7430(c)(7) which defines "position of the United States." The I.R.S. believes that its position was the one set forth in the stipulated judgment in which it agreed that the debtors' taxes were dischargeable and, therefore, because its position was the same as that of the debtors', they cannot claim that the I.R.S. position was not substantially justified. The I.R.S. concludes that, because the debtors cannot establish that the position of the I.R.S. was not substantially justified, they cannot be considered a prevailing

party within the meaning § 7430(c)(4)(A), and, therefore, are not entitled to an award of costs or attorneys' fees. This Court does not agree. Because language substantially similar to that in 26 U.S.C. § 7430 exists in 28 U.S.C. § 2412, this Court will address the I.R.S. contention in more detail.[5]

This Court follows the analysis of the United States Court of Appeals for the First Circuit and that of the United States District Court for the Eastern District of Virginia. In *Kaufman v. Roscoe*, 758 Fed. 2d 1 (1st Cir. 1985), the taxpayers, as individuals, were in dispute with the I.R.S. The Kaufmans had moved from their Illinois residence to Maine. Two years later, the Chicago district, having notice of the taxpayer's new address, sent a notice to the Kaufmans at their Chicago address that it would audit their 1978 tax return. The Kaufmans never received this notice. Consequently, they did not appear at the appointed time for the audit and the result was an assessment of a tax liability. In October, 1980, the I.R.S. mailed a notice of the tax liability to an address of another couple named David and Barbara Kaufman. Eleven days later, the I.R.S. acknowledged their error in a handwritten memo placed in the Kaufmans' file. During the same period, the I.R.S. was corresponding, regarding other matters, with the taxpayers at their Maine address. By 1983, the I.R.S. had connected the 1978 deficiency matter with the correct taxpayers. It then sent the Kaufmans, at their Maine address, a notice informing them that the I.R.S. was seizing a tax refund from their 1982 return as partial payment for their earlier deficiency. This notice was the first that the Kaufmans had received concerning this matter. Less than two weeks later, the Kaufmans had received yet another notice requesting payment. The Kaufmans instituted an action against the I.R.S. which then stipulated to the entry of a permanent injunction enjoining it from taking any steps to collect any taxes. The Circuit Court of Appeals considered the District Court's award of attorneys' fees to the Kaufmans.

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[5] *See supra* n. 2 and n.3.

The I.R.S. contended that § 7430 referred only to the governments in-court litigation position. The court in *Kaufman* acknowledged that courts, in determining whether to award attorneys' fees, are divided on the issue of whether to consider the term "civil proceeding" as including only litigation-related proceedings after a suit is initiated or whether it may also consider pre-litigation conduct. *Id.* at 3. The court in *Kaufman* held, and this Court concurs, that because it is in keeping with Congress's remedial bias in enacting § 7430, pre-litigation conduct should be considered in determining whether to award to a prevailing party, attorneys' fees.[6]

The court in *Kaufman* noted that the legislative history of § 7430 supported its proposition. Citing the STAFF OF SENATE COMMITTEE ON FINANCE, TECHNICAL EXPLANATION OF COMMITTEE AMED., 127 Cong. Rec. § 15587, 15594 (Dec. 16, 1981), the court noted that taxpayers who prevail in civil actions should be entitled to award when the United States has acted unreasonably in pursuing the case. *See Kaufman* at 4. Congress intended that the awarding of fees under § 7430 "will deter abusive actions and overreaching by the Internal Revenue Service and will enable individual taxpayers to vindicate their rights regardless of their economic circumstances." *Id.* (citing H.R. REP. No. 97-404, 97th Cong. 2d Sess. 11 (1982); SEN. FINANCE COMM. REP., supra, at § 15594). The court in *Kaufman* noted that the quoted language appeared to suggest that Congress did not intend to dissuade taxpayers who, prior to filing a suit, were faced with unreasonable conduct by the I.R.S. *See Kaufman* at 4. Finding that it would frustrate the

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[6] This Court acknowledges that Pub. L. 100-647, Sec. 6239(a) amended Internal Revenue Code § 7430 effective for proceedings commencing after November 10, 1988. Although the amendment resulted in changes in the statute's language, this Court finds that the issue of specifically which conduct constitutes "position of the United States" is still ripe for discussion. This Court further finds that, notwithstanding the amendments, such discussion would focus substantially on the same arguments.

purpose of § 7430 if it were to interpret it in such a way that the I.R.S., after causing a taxpayer all kinds of bureaucratic grief at the administrative level, could escape attorneys' fees liability by merely changing its tune after the initiation of a suit by the taxpayer, the court in *Kaufman* found that the I.R.S.'s bureaucratic mixup was unreasonable. *Id.* This Court agrees.

The United States District Court for the Eastern District of Virginia also considered the issue. *Sharpe v. United States of America*, 607 F. Supp. 4 (E.D.VA. 1984), considered the issue in light of an estate tax problem. The court in *Sharpe* was persuaded that reasonable litigation costs under § 7430 included costs and fees incurred at the administrative level, in attempting to negotiate the claimed refund, in preparation of the protest letter, and in the claim for refund. *Id.* at 7. The court dealt with the I.R.S. contention that "position of the United States" meant the position adopted in the action before the court, and would necessarily preclude the award of any fees incurred at the administrative level. *Id.* The court found that argument unpersuasive. *Id.*

It also noted that a decision to award fees only in adversary adjudication reflects a desire to limit the award of fees to situations in which the participants have a concrete interest at stake, but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies. *Id.* at 8. "In these situations, in order to ensure that individuals will actively seek to protect their rights vis-a-vis the government, they must have the opportunity to recover the costs of litigating. An administrative remedy in these circumstances cannot be truly effective unless a prevailing party is made whole." *Id.* (citing H.R. REP. No. 96-1418, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S.C.C.A.N. 4997). The court in *Sharpe* noted that a restrictive interpretation of § 7430 would produce the harsh result that a litigant could be subjected to meritless opposition at the administrative level without having a remedy for that expense once a proceeding was commenced in a court of the United States. *See Sharpe* at 8. Again, this Court agrees. Were this Court to determine the

merits of the issues at bar under the Internal Revenue Code § 7430, it would consider the prelitigation position of the I.R.S. Because of that, and because the language in 28 U.S.C. § 2412 is substantially similar, this Court, in the matter at bar, will consider, in addition to its current position, the position of the I.R.S. prior to that to which it adhered in its Agreed Order of May 20, 1992.

The only query left for this Court to consider is whether the I.R.S. shall be held liable for an award of attorneys' fees to the debtors, Henry Robert Grewe and Cathy Anne Grewe. Pursuant to this Court's reliance on two related Virginia bankruptcy court cases, this Court will draw the conclusion that the debtors should be awarded attorneys' fees.

The court in *In re Conti*, 42 B.R. 122 (Bankr. E.D. Va. 1984), found the I.R.S. liable to the debtor for reasonable attorneys' fees. In that case, the debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on August 3, 1983. The I.R.S. received actual notice of the debtor's bankruptcy filing. Nonetheless, the I.R.S. served a notice of levy upon the debtor's employer in order to collect upon the income tax liability. The debtor filed on behalf of the I.R.S. a proof of claim for the income taxes, interest, and penalties. The debtor filed an objection to said proof of claim and a motion to find the I.R.S. in contempt for violation of the automatic stay in serving notice of levy upon the debtor's employer for a prepetition obligation after receiving notice of the debtor's bankruptcy filing. Although the court in *Conti* declined to hold the I.R.S. in contempt, it nonetheless found the I.R.S. liable for reasonable attorneys' fees which the debtor incurred in enforcing her rights under the Bankruptcy Code. *Id.* at 128.[7]

The court noted that the I.R.S., as a prepetition creditor which ignored the automatic stay and levied upon the debtor's wages,

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[7] The court found that the statutory authorization for the award of attorneys fees, 28 U.S.C. § 2412(b), was an express waiver, although limited, of sovereign immunity. *See Conti* at 128.

clearly violated rights that Congress had given the debtor. *Id.* It further noted that for the debtor to incur legal expenses enforcing rights granted her under the Bankruptcy Code and not to compensate her for such expenses would be inequitable. *Id.* "[A]n opposite conclusion would mean the government could engage in dilatory tactics and ignore court orders in a bankruptcy proceeding without regard to the legal expenses imposed on the opposing party." *Id.* (*Citing In re Newlin*, 29 B.R. 781 (Bankr. E.D. Pa. 1983)). The court in *Conti* found that the I.R.S. action was not substantially justified nor did special circumstances exist making an award of attorneys' fees unjust.[8] *Id.* It noted that because the I.R.S. violated the automatic stay, counsel for the debtor was required, at a minimum, to inform the debtor of her rights, make telephone calls, file motions, appear at hearings, and file a brief to support the motion as the court requested. *Id.* Because the debtor's attorney spent a reasonable amount of time due to the I.R.S. violation of the automatic stay, the court made an award to the debtor for reimbursement of the attorneys' fees incurred due to the violation, "although inadvertent," of the automatic stay. *Id.* In a related case, *In re Conti*, 50 B.R. 142 (Bankr. E.D. Va. 1985)(hereinafter "*Conti II*"), the bankruptcy court referred to its previous decision and stated the following: "[Notwithstanding that] the evidence in the first case pointed to an inadvertent violation of the automatic stay due to a clerical error by the I.R.S., and. . . [the] prompt release of its levy upon notification that the debtor had filed bankruptcy,. . . the I.R.S. should. . . be liable to the debtor for reasonable attorneys' fees."

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[8] In the case at bar, this Court notes that the "substantially justified" language of § 2412 refers only to the mandatory versus discretionary quality of a court's decision to award attorneys' fees. Section 2412(b) states generally that a court "may award reasonable fees. . . ." Section 2412(d)(1)(A) states that a court "shall award. . . fees. . . unless. . . the position of the United States was substantially justified. . . ." This Court reads § 2412(d)(1)(A) to require an award of fees under certain circumstances. However, even if a court should find the position of the United States substantially justified, it may, pursuant to § 2412(b), award attorneys' fees.

In *Conti II*, essentially the same facts exist as those in *Conti*, *supra*. In *Conti II*, the court noted the following additional facts. On January 31, 1984, the debtor received her Chapter 7 discharge. On June 6, 1984, the I.R.S. mailed to the debtor a "past due notice." The I.R.S. attached to the notice an indication that the debtor had a tax liability for the period ending December 13, 1977.[9] The debtor maintained that her unpaid 1977 income taxes, penalties, and interest were discharged on January 31, 1984 and, thus, further collection activity by the I.R.S. was enjoined. The I.R.S. conceded that the past due notice was post-discharge, and that the debtor's tax obligation for 1977 was dischargeable and was discharged, except to the extent of any setoff to which it maintained it was properly entitled to effect. For the violation of the § 524 discharge, the court in *Conti II* found an award of attorneys' fees entirely appropriate and, thus, awarded them.

This court agrees with the *Conti* and *Conti II* courts' analyses. Accordingly, this Court finds that for the debtor in the case at bar to have incurred legal expenses in enforcing rights granted them under the Bankruptcy Code and not to compensate them for such expenses would be inequitable. Notwithstanding its violation being potentially inadvertent and its attempts to rectify it promptly, the I.R.S. clearly violated the § 524 discharge order and, thus, its position cannot be substantially justified. Therefore, this Court holds the I.R.S. liable to the debtors for the attorneys' fees as requested in their Motion for Costs and Attorneys' Fees. Because this Court does not determine that an increase in the cost of living or any special factor or set of factors justifies a higher fee, the attorneys' fee award must be limited in accordance with

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[9] This date appears to be an error in the facts. In all likelihood, as an individual, the taxpayer's tax year ended on December 31. The numbers were most likely transposed inadvertently.

28 U.S.C. § 2412(d)(2)(A).[10] Under this limitation, the debtors are entitled to $2,035.[11]

Accordingly, this Court recommends that judgment in the amount of $2,035 be entered in favor of the debtors.

Pursuant to Bankruptcy Rule 9033, the Clerk is directed to transmit copies of this document to counsel for the parties. Any party objecting to these Findings of Fact and Conclusions of Law shall, within ten (10) days after being served, file their objections to the findings or conclusions with the Clerk of the Bankruptcy Court. Likewise, any response to any objection shall be filed within ten (10) days after being served with the objection. Written objections shall identify the specific finding or conclusion to which an objection is made and the objection shall specifically state the grounds upon which the objection is based.

Upon expiration of the time for submitting objections and responses, the Court will forward the record to the United States District Court for its review and consideration.

Respectfully submitted,

/s/ Edward Friend II
U.S. Bankruptcy Judge

DATED: 11/27/92

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[10] *See* n.2.

[11] The debtors' request for fees indicates two attorneys billing in excess of $75 per hour. Based upon their total time spent in pursuing the matter at bar, 24.60 hours, this Court limits their award to $1,845. This, the expense reimbursement of $295, and what appears to be paralegal fees of $135 total $2,275. Because the debtors' request does not indicate to what the prepaid amount of $240 should be applied, it will be applied against the total allowable award. Therefore, the total award to which the debtors are entitled is $2,035.